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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ferrellgas, L.P.

Serial No. 75738326

Michael Elbein of Hovey Williams LLP for Ferrellgas, L.P.

Fred Mandir, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Walters, Chapman and Bucher, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Ferrellgas, L.P. seeks registration on the Principal Register of the mark FUELGAS for goods and services identified as "propane gas" in International Class 4 and "transportation of propane gas by truck and pipeline," in International Class 39.[1] The application, as amended, seeks registration under Section 2(f) of the Trademark Act (15 U.S.C. §1052(f)) as a result of the mark acquiring distinctiveness due to substantially exclusive and continuous use of the mark in commerce since 1958.

[1] Application Serial No. 75738326 was filed on June 28, 1999 based upon applicant's claim of use in commerce since at least as early as September 12, 1958.

The Trademark Examining Attorney has refused registration under Section 2(e)(1) of the Trademark Act on the ground that the term FUELGAS, when used on propane gas and the transportation thereof, is generic and, thus, incapable of functioning as a source-identifying mark.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney submitted briefs. Applicant did not request an oral hearing.

The Trademark Examining Attorney maintains that the term sought to be registered is generic. More specifically, he asserts that the term is the name of "the specific goods and the category of goods transported." (Trademark Examining Attorney's appeal brief, p. 5)

It has been repeatedly stated that "determining whether a mark is generic … involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered or retained on the register understood by the relevant public primarily to refer to that genus of goods or services?" *H. Marvin Ginn v. International Association of Fire Chiefs*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986). Of course, in a proceeding such as this, the genus of services at issue are the services set forth in the recitation of services in the application itself. *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552

(Fed. Cir. 1991) ["Thus, a proper genericness inquiry focuses on the description of services set forth in [the application or] certificate of registration."].

Moreover, the burden rests with the Trademark Examining Attorney to establish that the mark sought to be registered is generic for the goods and services as described in the application. *In re Merrill Lynch*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1997). It is incumbent upon the Trademark Examining Attorney to make a "substantial showing … that the matter is in fact generic." Indeed, this substantial showing "must be based on clear evidence of generic use." *Merrill Lynch*, 4 USPQ2d at 1143. Thus, it is beyond dispute that "a strong showing is required when the Office seeks to establish that a term is generic." *In re K-T Zoe Furniture Inc.*, 16 F.3d 390, 29 USPQ2d 1787, 1788 (Fed. Cir. 1994). Furthermore, doubt on the issue of genericness must be resolved in favor of the applicant. *In re Waverly Inc.*, 27 USPQ2d 1620, 1624 (TTAB 1993).

Addressing the first part of the *Ginn* genericness inquiry above, we find that the genus of goods at issue in this case is propane gas and that the genus of services at issue in this case is the transportation of propane gas.

We turn next to the second part of the *Ginn* genericness inquiry: whether the matter applicant seeks to register,

FUELGAS, is understood by the relevant public primarily to refer to the genus of goods and services at issue, i.e., propane gas and the transporting of propane gas.

The Examining Attorney initially assigned to this case provided separate dictionary definitions of the words "fuel"[2] and "gas"[3], arguing that these two words are "generic synonyms for each other." (Office action of July 3, 2001).

In support of the refusal, each of the three successive Examining Attorneys assigned this case submitted excerpts of articles retrieved from the LEXIS/NEXIS database and/or webpages from the Internet showing uses of "fuelgas" (and variations thereof) used in connection with gaseous materials.

In response, applicant argues that the term FUELGAS is not generic, but rather should be deemed to be merely descriptive, and that the term has acquired distinctiveness when used in connection with its propane gas and the transportation thereof. Applicant asserts that consumers associate the term with applicant, and that competitors do not need to use the term to describe their propane gas and the transportation thereof. Applicant argues that:

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[2] **fuel**: 1. Something consumed to produce energy, especially: a. A material such as wood, coal, gas, or oil burned to produce heat or power… The American Heritage Dictionary of the English Language, (3rd Ed 1992).

[3] **gas**: … 2. A gaseous fuel, such as natural gas… The American Heritage Dictionary of the English Language, (3rd Ed 1992).

> Applicant's mark is not generic for Applicant's goods or services… The evidence supplied by the various Examining Attorneys to whom this application has been assigned show that while "fuel" and "gas" often appear in conjunction to refer to some type of fuel, the terms are not the genus for propane …. The evidence presented in which the compound word FUELGAS do[es] appear are for the most part … apparently used to describe some substance other than propane …. (Applicant's appeal brief, p. 4).

To our knowledge, this two-word designation does not appear in any general or specialized dictionaries. We agree with applicant that most of the NEXIS excerpts placed into the file discuss a gaseous product known as "fuelgas" (or "fuel gas"), but it is not propane gas. Rather, the references reveal a wide range of industrial by-products known in general as "fuel gas streams." They are produced in oil refineries, chemical plants, coal gasification or biomass gasification settings, and may be used elsewhere in the industrial plant or may be piped offsite for power generation:

> UNION PACIFIC STARTS UP SOUR-GAS WAHSATCH SYSTEM
> In October 1993, the sour gas and ***fuelgas*** pipelines were hydrostatically tested to ensure their integrity before start-up. The minimum test pressure for the sour-gas line was 180% of the MAOP of 1,760 psig.[4]
>
> TUNE-UP OF AMINE SYSTEM AVOIDS COSTLY NEW SYSTEM
> * Persistent foaming problems resulted in amine carryover into the ***fuelgas*** system. It was obvious that charcoal and iron sulfide fines were being carried downstream from the charcoal filters… .[5]

[4] *Oil & Gas Journal*, June 27, 1994.
[5] *Oil & Gas Journal*, March 15, 1999.

CLEAN COAL PROJECT READY FOR NEXT PHASE

When all of the energy of the coal is put through the gasifier, then the steam within the ***fuelgas*** stream can't be superheated, Welford said… .[6]

GERMANY, INC.

… The company claims it can convert all types of coal, including lignite and anthracite, to ***fuelgas***. The company claims that pilot plants using Prenflo emit 25% less CO_2 than equivalent coal-electric units.[7]

INCINERATION – TODAY'S HOT OPTION FOR WASTE DISPOSAL

If a liquid waste has very low ash or inorganic content, and if no halogens, sulfur or phosphorus are present, then the quality of the ***fuelgas*** from the incinerator will be much the same as that from combustion of a fossil fuel… .[8]

RECOVERING HEAT IN FIRED HEATERS

For fired heaters, American Petroleum Institute (API) Standard 560 recommends, for natural-draft operation, 20% excess air for ***fuelgas*** and 25% for fuel oil… .[9]

CRYOGENICS PRINCIPLES AND APPLICATIONS

… A PSA unit could provide the hydrogen, of course, but it could not yield a sotichiometric N_2:$3H_2$ synthesis stream, a pure-argon fraction, and a highly concentrated ***fuelgas***.[10]

TREATING HYDROGEN SULFIDE: AN ALTERNATIVE TO CLAUS

… Among anaerobic applications: treating refinery ***fuelgas***, digester gas from sewage plants, and acid gases from amine treaters; disposing of stripper gas from sour waters; and processing syngas from coal gasifiers.[11]

HANLAN-ROBB COMES ON STREAM

… Power to the RTUs is provided by individual ***fuelgas***-powered thermoelectric generators, which can output 50W at 24 V.[12]

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6 *Coal & Synfuels Technology*, January 22, 1996.
7 *Chemical Engineering*, December 1990.
8 *Chemical Engineering*, October 12, 1987.
9 *Chemical Engineering*, August 18, 1986.
10 *Chemical Engineering*, May 13, 1985.
11 *Chemical Engineering*, January 21, 1985.
12 *Oil & Gas Journal*, October 22, 1984.

FUEL GAS SYSTEM ADVISOR

Application: The ***Fuel gas*** system Expert System Process Advisor (ESPA) provides the process operator with specific guidance and information to optimize and improve a refinery or chemical plant ***fuel gas*** system. Within complex refineries and chemical plants, the ***fuel gas*** system is integral to the plant operation because it supplies and/or exports ***fuel gas*** to virtually every process unit in the plant. Further complexity is introduced because ***fuel gas*** may be purchased from multiple producers at differing rates, and/or may be sold to other companies at different rates.

The ***fuel gas*** rate of import and/or export flow on each process unit varies from minute to minute as a result of varying heating requirements, different feed rates, changing ***fuel gas*** Btu heat contents, weather, and other load and process disturbances. Also, the operators make changes to the ***fuel gas*** import and/or export to optimize their process units and those changes affect the total ***fuel gas*** balance. The overall coordination/optimization/monitoring of the ***fuel gas*** system is difficult because an operator on a unit on one side of the plant frequently does not know what an operator on a unit on the other side of the plant is doing. The purposes of a ***fuel gas*** ESPA are to provide the tools and advice for overall ***fuel gas*** system optimization. Gensym's G2 is used to store the knowledge and provide the operator interface.[13]

DETAILS OF TWO IMPLEMENTED OPPORTUNITIES

Key Strategies:

- Minimize LPG in ***fuel gas*** by improving operations of crude-distillation unit (CDU) light ends … .
- Improve ***fuel-gas*** system pressure control to minimize ***fuel-gas*** let down to flare and to encourage operators to burn more ***fuel gas*** in heaters.[14]

DLN COMBUSTORS DEMAND BETTER ***FUEL-GAS*** CONDITIONING

Premature overhauls and flashback incidents in gas turbines equipped with dry low-NO_x (DLN) combustors can be avoided simply by improving ***fuel-gas*** conditioning.

Originally, gas turbines were engineered for 30,000 to 40,000 hours between overhauls. Unfortunately, in

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13 *Hydrocarbon Processing*, September 1, 2001.

14 *Oil & Gas Journal*, May 1, 2000.

> some cases, gas turbines equipped with DLN combustors only last 2000-3000 hours between overhauls because of entrained aerosols in the ***fuel gas***.
>
> In other cases, the ***fuel gas*** is falling below its dew point, allowing condensation to fall out of the gas and cause damaging flashback incidents. To avoid condensation, turbine manufacturers are requiring 50F of superheat in the ***fuel gas***, which means the gas must be maintained at least 50F above its dew point. Because on-line dew point analysis typically is not conducted, the gas often is heated by 50F continuously… .[15]

The current Trademark Examining Attorney also submitted a variety of summary hits from Internet searches. As seen above in the NEXIS stories, multiple Internet summary hits show that the term "fuel gas" is used in the refinery and petrochemical industries (incendium.com, processassociates.com, coking.com) where refinery tail gases are used elsewhere in the refining process or moved through pipelines (kodoor.com), filtered (nfs-inc.com, axsia-serckbaker.com) and compressed (gascompressor.com) on their way to power high temperature gas turbines. Additionally, "oxygen-fuel gas" is a term of art for welding and cutting torches (torchcutter.com, energyadditives.com, deansafe.com). Yet none of these examples demonstrates generic usage for propane gas or for the transportation of propane gas.[16]

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[15] *Power*, March-April 2001.

[16] Seven NEXIS stories and a number of Internet hits were references to a company known as "National Fuel Gas Distribution Corporation" (with its trade name shortened to "National Fuel"), a

This leaves very few examples in the record – one where the term "fuel gas" is used to describe commercial gas products like propane (e.g., in the context of discussion of advances in a residential hot water boiler) and a second where the pipeline transportation of some type of gas (although the abbreviated sections shown from the *Pipeline and Gas Journal* do not mention propane):

> WET-RECUPERATED BOILER TECHNOLOGY: AN ADVANCE IN HYDRONIC HEATING EFFICIENCY
> In the QL boiler, combustion air is heated and fully saturated with water (condensate), mixed with the ***fuel gas*** (natural or propane), and ignited.[17]
>
> DEVELOPMENTS IN PLASTIC PIPE TECHNOLOGY AND TRENCHLESS INSTALLATION
> Over the last 50 years there have been major changes in the materials used to construct pipe networks for the ***transportation of fuel gas*** at or below 10 bar gauge.[18]

Despite repeated searches on databases spanning almost twenty years (e.g., 1984 to 2002), the Office was able to locate very few examples of generic usage, and these are from publications directed to specialized industries.

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company that sells and transports natural gas to customers in western New York (Buffalo) and northwestern Pennsylvania (Erie).

We consider the Internet hits showing usage of this combined term in Canada, Europe and Asia to be of minimal evidentiary value as they do not necessarily show usage of the term as U.S. consumers would view it. *See In re Urbano*, 51 USPQ2d 1776, 1778 (TTAB 1999).

A final broad category of non-commercial usage appears in international standards, national regulatory codes (e.g., Federal Energy Regulatory Commission), and state and local building codes.

[17] *Air Conditioning, Heating and Refrigeration News*, December 7, 1998.

[18] *Pipeline and Gas Journal*, December 1, 2001.

In fact, we agree with applicant that the instant case is analogous to the facts of *In re Minnetonka, Inc.*, 3 USPQ2d 1711 (TTAB 1987) [despite the fact that "soft soap" has a technical meaning as an industrial type potash soap, the designation SOFTSOAP is not a generic designation for liquid soap sold to consumers in a pump-type dispenser]. Similarly, in the instant case, it is obvious that "fuelgas" (or "fuel gas") is a technical term in various hydrocarbon-processing industries. However, the record shows that despite decades of usage by applicant (and its predecessors) of this term, there is substantially no usage of this term by applicant's competitors, who do not have a need to use the term FUELGAS as a generic designation for propane or the transportation of propane.

In the absence of any usage by competitors, we still apply logic and common sense to the plain meaning of these two ordinary, English-language words within the real-world context of applicant's propane gas. The initially-assigned Trademark Examining Attorney characterized these two nouns as "generic synonyms for each other." The cited dictionary defines the word *fuel* as "gas" and the word *gas* as a "gaseous fuel." When placed together, the combination involves significant re-duplication – a somewhat awkward iteration of terms. Substantially all types of gas discussed in this record are

used as some form of fuel. By way of contrast, consider, for example, the dictionary definitions of the designation "fuel oil," of which we take judicial notice.[19] Most oil is used as a lubricant – not as a fuel. Accordingly, in the context of "fuel oil," the word "fuel" is a critical modifier for the word "oil."[20] Again by way of contrast, the combined term "fuel oil" is so clearly a generic designation (and a dictionary term) used by everyone in the field of selling or transporting oil to be used as a fuel.

On the other hand, the fact that applicant may have chosen to eliminate the space between these two words ("fuel" and "gas"), thereby compressing two words into a single word, is immaterial to the result herein. Relevant purchasers will readily understand "fuelgas" to be "fuel gas" in the context of applicant's goods or services. Our principal reviewing court specifically stated that the presence or absence of a space between the words was not determinative of its status as a "compound word." *See In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987) [SCREENWIPE generic for premoistened antistatic cloths for cleaning computer and

[19] **fuel oil**: an oil that is used for fuel and that usu. has a higher flash point than kerosene. Webster's New Collegiate Dictionary (1973).

[20] **oil**: 1 a: any of numerous unctuous combustible substances that are liquid or at least easily liquefiable on warming, are soluble in ether but not in water, and leave a greasy stain on paper or cloth. Webster's New Collegiate Dictionary (1973).

television screens]. *See also In re Sun Oil Co.*, 426 F.2d 401, 165 USPQ 718 (CCPA 1970) [CUSTOMBLENDED generic for custom blended gasoline]; *Cummins Engine Co. v. Continental Motors Corp.*, 359 F.2d 892, 149 USPQ 559 (CCPA 1966) [TURBODIESEL generic for internal combustion engines]; *In re Abcor Development Corporation*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978) [GASBADGE for gas monitoring badges]; *Turtle Wax, Inc. v. Blue Coral, Inc.*, 2 USPQ2d 1534 (TTAB 1987) [WASHWAX generic for product which simultaneously washes and waxes a vehicle]; and *Micro Motion Inc. v. Danfoss A/S*, 49 USPQ2d 1628 (TTAB 1998) [MASSFLO for flowmeters for measuring flow of mass of fluid].

Accordingly, in answering the second prong of the *Marvin Ginn* genericness inquiry as to how FUELGAS is understood by the relevant public, this record shows very few examples of where this term is used in a generic manner. This empirical observation is consistent with our earlier analysis of the composition and origins of this combined term, *supra*. Accordingly, we have doubt on the issue of genericness. Under our case law on genericness, we must resolve such doubt in favor of applicant. Hence, we are compelled to reverse the refusal to register made by the Trademark Examining Attorney. Of course, any entity that can demonstrate a legitimate interest in the use of FUELGAS for propane or the

transportation of propane may file an opposition to this application. *Cf*. *In re Merrill Lynch, Pierce, Fenner, and Smith Inc*., 828 F.2d 1567, 4 USPQ2d 1141, 1144 (Fed. Cir. 1987).

Applicant has argued, should we find this matter not to be generic, that pursuant to Section 2(f) of the Trademark Act, we should find that the designation FUELGAS has acquired distinctiveness as a source indicator in light of prominent use of this term by applicant (and applicant's predecessors) for more than fifty-six years.[21]

The Trademark Examining Attorney failed to address applicant's showing of acquired distinctiveness on its merits. That is, having taken the position that any evidence of acquired distinctiveness is irrelevant for a generic term, the Trademark Examining Attorney has done nothing, in the alternative, to refute this particular showing. Given the decades of usage of this term throughout a large region of the country by applicant and its predecessors, accompanied by a showing of advertising expenditures of a million dollars a year over a period of many years, we conclude that applicant has proven acquired distinctiveness by a preponderance of the

[21] While the application papers claim first use anywhere as of September 12, 1958, counsel alleges that the mark was actually used by applicant's predecessor in interest as of 1947.

evidence. *See Tone Brothers, Inc. v. Sysco Corp.*, 28 F.3d 1192, 31 USPQ2d 1321 (Fed. Cir. 1994) [the party attempting to establish legal protection for its mark has the burden of proving acquired distinctiveness by a preponderance of the evidence].[22]

Decision: The refusal to register this matter as generic under Section 2(e)(1) of the Act is hereby reversed, and the application will be forwarded for publication for opposition in the *Trademark Official Gazette* under the provisions of Section 2(f) of the Act.

[22] While it may generally not be prudent for trademark counsel to be the one signing a declaration on behalf of a corporate client (*see Allstate Insurance Co. v. Healthy America Inc.*, 9 USPQ2d 1663, 1666 (TTAB 1988)), we find Mr. Elbein's declaration of December 28, 2001 to be drafted in such a way as to support applicant's *prima facie* case of acquired distinctiveness.